

Thursday, 30 October 1947

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Paper No. 1357, application to prosecution
for the release of interrogations of Eugene Ott.

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Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth of
Australia.

Reported by:

Julian Wolf
Official Court Reporter
IMTFE

Appearances:

For the Prosecution Section:

Mr. Frank S. Tavenner, Jr.

Mr. Floyd W. Cunningham.

For the Defense Section:

Mr. Owen Cunningham, Counsel for
the accused OSHIMA, Hiroshi.

Mr. Ben Bruce Blakeney, Counsel for
the accused UMEZU, Yoshihiro.

For the Secretariat:

Judge Edward H. Dell, Legal Adviser.

Mr. Paul Lynch, Clerk of the Court.

The proceeding was begun at 0910.

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THE PRESIDENT: This is Paper No. 1357. It is an application on behalf of the accused OSHIMA by his counsel, Mr. Owen Cunningham, for an order directing the prosecution to release to counsel for the accused all interrogations conducted with the former German Ambassador to Japan, Eugene Ott.

It is represented by the counsel for the accused that a subpoena issued for the appearance of Ott had not been honored.

Yes, Mr. Cunningham.

MR. CUNNINGHAM: Well, as I understand it, there are several interrogations of Ambassador Ott that have perhaps contained information which would be helpful to us, I don't know, but I would like to peruse it.

I have never had sufficient opportunity to talk to Mr. Ott. I saw him in Shanghai for a little while, while he was there, and took some answers to some specific interrogatories that I had, but I certainly didn't have enough time to go over the whole picture with him.

THE PRESIDENT: What is the attitude of the prosecution, Mr. Tavenner?

MR. TAVENNER: We think, if your Honor please, that as a matter of principle we should oppose turning over our private files regarding any person who is not an accused.

THE PRESIDENT: Well, you had been limited to turning over answers to interrogatories. In a national court this application would not even be made, its prospects would be so hopeless. But this is a rather special case, actually. They did try to get Ott. They couldn't. They could still, of course, administer interrogatories to him, but that would take a long time and it is too late now, really, to talk about administering interrogatories to somebody in Germany; at least I would think so.

MR. TAVENNER: I would like to refresh your Honor's mind as to what has occurred with regard to Ott.

THE PRESIDENT: Yes, do.

MR. TAVENNER: Counsel for SHIRATORI appeared before your Honor in chambers and I agreed to the counsel taking an affidavit from Ott. In fact, he went to China and stayed there quite a long period of time, and advised before he left all the counsel for the defense on at least two occasions, in meetings, and possibly a third, that he was going there. He

took, I understand, quite a number of questions that counsel for OSHIMA desired be asked of OSHIMA. I agreed to the use of that affidavit in evidence in the determination later by the prosecution whether they would attempt to get counteraffidavit or submit interrogatories.

Then, after that affidavit was returned, counsel for OSHIMA stated that he desired to submit certain interrogatories, to which I agreed and at which time I submitted certain counterinterrogatories. The understanding was that they were to be sent to China and taken in the accustomed way. Instead of that, counsel for OSHIMA took them individually, and there consulted Ott and took an affidavit in addition, which we think is improper because we know nothing of the contents of that affidavit and had no opportunity to prepare counterinterrogatories.

So, there has been every opportunity given. In fact, counsel for OSHIMA, many months before Ott left here, talked to me about interviewing Ott, at which time I told him there was certainly no objection on the part of the prosecution to doing it.

Now, in view of that history of the matter, it would seem to me that this is purely a fishing expedition into the files, private files, of the

prosecution, and on principle it should not be permitted.

THE PRESIDENT: Well, you have given me a lot of information that I do not know and which I did not suspect.

MR. BLAKENEY: May I state a word?

THE PRESIDENT: You may.

MR. BLAKENEY: I do not appear on this application, but I am in a position, and, if necessary, would file a similar application, so I should like to state my position.

I have been trying for something around a year, more or less, to interview Eugene Ott. Originally he was subpoenaed by the Tribunal at the instance of other defendants; then Mr. TOGO on whose behalf I stand. I therefore did not issue a subpoena assuming that he would come here in the course of time. I learned sometime within the last few months that he was not coming here, but was going to be repatriated to Germany direct from China.

At that time I took the matter up with SCAP about seeing whether he could be made available here to me. They said "Issue a subpoena." I did. Notwithstanding that a subpoena was then outstanding, I did move, your Honor, for the issuance of a subpoena,

which was issued. The subpoena was presented to SCAP for service. The next thing I heard was the day before yesterday, I should think. At all events, some day this week I received word through SCAP that from Chinese sources they were advised that he had been repatriated to China.

I had never been to China during the pendency of this trial, although I have had SCAP orders to go for almost a year. I haven't had time to go. I haven't wanted my witnesses interviewed by counsel for OSHIMA because our interests are more or less antagonistic as he will agree, I think. I haven't wanted my witnesses interviewed by counsels for SHIRATORI or anybody else for a variety of reasons.

Therefore, I am in the position of having tried with due diligence, I think, to interview this man Ott for over a year. I have had no success whatever owing entirely to causes outside my control, or that of the Tribunal either, for that matter, and I feel that it is only fair to the defense to be given access to interrogatories taken in connection with the very matters here being litigated, and which, of course, are not the prosecution's interrogatories. They are the interrogatories of the Allied Powers in a sense, taken by that agency of the Allied Powers.

I therefore want to urge this application for the reasons I pointed out; that it does affect my client's interests and because I do not feel in any position to send interrogatories to Germany, or to go to Germany to take this testimony which may be very vital.

THE PRESIDENT: Mr. Cunningham.

MR. CUNNINGHAM: I would like to answer what Mr. Tavenner said.

I had very little part, because I was very busy at the time, in the presentation of the interrogatories that Mr. SHIRATORI's counsel took, but he took them in a very haphazard manner by leaving them there in the possession of somebody, to have them administer them to Mr. Ott at the convenience of someone else, and I received them through the mail a long time later and they were not satisfactory as far as I was concerned.

Then my interview with Ambassador Ott in Shanghai was at my own expense, because I arrived back from home and I heard that Ott was being repatriated so I took a Northwest over to see Ott and I only had a day with him before the boat left and it was not satisfactory.

Now, I haven't found out what I wanted to

find out and I am satisfied it is in the interrogatories or the interrogation that Mr. Ott gave the prosecution.

Now, he was very reluctant to tell me anything the day before he went to Germany, because naturally he has his own self-preservation to look after, so it wasn't satisfactory at all.

I think that the information I want is in the interrogation that the prosecution has and I would like to see it. That is the reason why I am urging this. If I could have found it out otherwise, I wouldn't be here with this application.

THE PRESIDENT: Well, you see, they are asking only for the whole of his answers to the interrogations to be disclosed. They are not asking for a perusal of the private files at all, Mr. Tavenner.

Frankly, I favor it, but a majority of my Brothers may think otherwise. We don't always see eye to eye in these matters, so you can do whatever you like. You can ask for reference to the whole Tribunal or let me decide. But I do favor disclosing everything in the nature of an answer to an interrogatory by the prosecution in the peculiar circumstances, having regard to the length of this trial already; to our hopes to finish it within four or five months;

to the absence of this man in Germany; to the number of the accused interested in what he says; and to the overwhelming importance on what he says on one or two issues.

Well, you might like to consider the position, Mr. Tavenner.

MR. TAVENNER: Yes.

THE PRESIDENT: That is all I can say. If either side wants me to refer it to the whole Tribunal, I shall do so. But these are things about which judges differ.

(Whereupon, at 0920, the proceeding was concluded.)

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